

APPEAL NO. 020519  
FILED APRIL 18, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 11, 2002. The hearing officer resolved the issues before him by determining that (1) the respondent (claimant) sustained a compensable injury to his low back on \_\_\_\_\_; (2) the appellant (carrier) is not relieved of liability as the claimant timely reported his injury; (3) the claimant did not make an election of remedies to receive benefits under a health insurance policy and is thus not barred from pursuing his workers' compensation claim; and (4) the claimant had disability from December 4, 2001, through February 5, 2002. The carrier appealed on sufficiency grounds, and also argued that the hearing officer incorrectly used an improper standard of the law regarding the claimant's timely notification. The claimant responded, and urged that the hearing officer's decision and order be affirmed in its entirety.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant sustained a compensable injury to his low back on \_\_\_\_\_. The claimant's testimony and the medical evidence support that conclusion. In affirming this determination, we likewise affirm the hearing officer's conclusion that the claimant had disability from December 4, 2001 (the date of his back surgery), until February 5, 2002, when the claimant was released to light-duty work (into which category his usual, engineering job falls).

Nor did the hearing officer err in determining that the claimant timely notified his employer of his injury. Testimony from both the claimant and his supervisor clearly showed that the claimant discussed his injury with his supervisor on the day after the date of injury, because of his need to be away from work to go to a doctor. The only question raised by the carrier was whether the claimant informed his supervisor that the injury was work related. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In this regard, it appears that the hearing officer chose to rely upon the testimony of the claimant, who said he explained in detail to his supervisor about how he injured his back while unloading boxes after his employer moved to new offices. The hearing officer also wrote that because the claimant immediately reported the injury as work related to his doctor, he is more likely to have actually hurt himself at work.<sup>1</sup> The carrier's argument that the hearing officer misapplied the law is thus insupportable.

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<sup>1</sup>We note that the supervisor also testified that the claimant told him he had hurt his back while moving boxes. The supervisor then states, though, that the claimant did not say that it happened at work.

With respect to the issue of whether the claimant made an election of remedies, barring him from claiming workers' compensation benefits, the carrier's argument that the claimant did waive his right to claim workers' compensation benefits fails. The hearing officer made a finding that the claimant did not make a conscious decision to forego workers' compensation. In addition, the Dallas Court of Appeals has held that the 1989 Act, specifically the subclaimant provisions of Section 409.009, removed election of remedies as a viable argument. Valley Forge Ins. Co. v. Austin, 65 S.W.3d 371 (Tex. App.-Dallas 2001, no pet. h.). Also, the Appeals Panel has long determined that a claimant's resorting to his private health insurance to pay for medical treatment will not constitute an election under Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980). See Texas Workers' Compensation Commission Appeal No. 002682, decided December 22, 2000.

The hearing officer's determinations are supported by the evidence, and they are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 001360, decided July 27, 2000.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MARCUS CHARLES MERRITT  
6600 CAMPUS CIRCLE DRIVE EAST  
IRVING, TEXAS 75063.**

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Terri Kay Oliver  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Robert W. Potts  
Appeals Judge